Supreme Court, U.S.
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No. 93-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

JOSEPH KIRSH,

Petitioner,

vs.

WILLIAM SCOTT, Warden, Metropolitan Correctional Center,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

A. LAWRENCE WASHBURN, JR.
(Counsel of Record)
ATTORNEY FOR PETITIONER JOSEPH KIRSH
405 West 23 St. (#12C)
New York, New York 10011
(917) 797-6776

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18 pp

QUESTIONS PRESENTED

1. Whether a federal prisoner must resort to the internal grievance procedure of the Federal Bureau of Prisons before he may initiate a habeas corpus proceeding under Estelle v. Gamble, 429 U.S. 97 (1976)?

2. Whether a federal prisoner's statement of his serious medical needs under the Eighth Amendment was required to be predicated upon a prior medical examination and a physician's affidavit?

PARTIES

None of the parties is a corporation within the conflict of interest Rule of this Court, Rule 28.1.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, JOSEPH KIRSH, respectfully requests this Court to grant his Petition For A Writ Of Certiorari.

OPINIONS BELOW

By Order dated July 27, 1993, the United States District Court for the Southern District of New York by the Honorable Kevin Thomas Duffy, United States District Judge, denied the writ of habeas corpus.

(A-5) On January 12, 1994, the United States Court of Appeals for the Second Circuit (Newman, Winter, CJJ and Brieant, D.J.) affirmed the judgment of the District Court. (A-1) These opinions have not been reported.

Mr. Justice Clarence Thomas granted an extension to May 12, 1994 to file the petition for certiorari.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on January 12, 1994 and this petition is filed within the time as extended to May 12, 1994. This Court's jurisdiction rests upon review of a final civil judgment in the Court of Appeals.

STATEMENT OF THE CASE

On July 14, 1993, the habeas corpus petition was filed seeking examination by a private physician, which had been denied by MCC. On July 19, 1993, the assigned judge was changed from Judge Preska to Judge Duffy. Later the same day, Petitioner filed an Eighth Amendment Memorandum and Declaration by his special counsel which had been requested by Judge Preska and a physician's affidavit. This was the private physician who had been refused a medical examination of Petitioner by MCC. On July 27, 1993, the District Court dismissed the petition without adjudicating the Eighth Amendment claims in part on the ground that the serious medical needs of Petitioner had not been stated by a physician. The Court did not rule, except by implication, on Petitioner's requested relief in his habeas corpus petition, viz., an examination by his private physician.

On August 11, 1993, a motion for release

pending appeal was filed on behalf of petitioner stating upon information and belief that petitioner had suffered an Eighth Amendment injury in the form of a heart attack and on August 20, 1993, a memorandum was filed in support of the motion. The Government opposed on the ground that no heart attack had in fact occurred and requested sanctions under Rule 11, F.R. Civ. P. At sentencing, Judge Duffy made an upward departure in sentencing JOSEPH KIRSH based upon his allegedly false claim of a heart attack and subsequently imposed $10,000 in sanctions upon his attorney. The sanctions were challenged in a post-judgment motion, which is now pending.

In the District Court and the Court of Appeals, the Government urged dismissal on the ground that a federal prisoner must resort to the internal grievance procedure of the Federal Bureau of Prisons (28 C.F.R. 542.10, et seq.) before he may initiate a habeas corpus proceeding under Estelle v. Gamble, 429 U.S. 97 (1976), claiming an Eighth Amendment violation based upon conscious and unjustified disregard of his serious medical needs. The Government cited Johnpoll v. Thornburgh, 898 F2d 849 (CA2), cert. den., 111 S. Ct. 63 (1990) in support of the exhaustion of administrative remedies argument but did not cite or discuss this Court's decision in McCarthy v. Madigan, 112 S. Ct. 1081 (1992) ("McCarthy").

The District Court did not rule at all on the exhaustion of administrative remedies argument but the Court of Appeals used that argument as an alternative ground for affirmance, citing its decision in Johnpoll v. Thornburgh, supra. The Court of Appeals did not refer to or discuss this Court's opinion in McCarthy. Since the rulings in the District Court and the Court of Appeals, Petitioner JOSEPH KIRSH has been moved from the Metropolitan Correctional Facility in New

York but still is subject to the internal grievance procedure of the Federal Bureau of Prisons.

REASONS FOR GRANTING THE WRIT

The issues which will be presented in this appeal are significant and should be addressed by this Court to resolve the issues left open in McCarthy v. Madigan, 112 S. Ct. 1081 (1992).

A. A HABEAS CORPUS PETITION FOR SERIOUS MEDICAL NEEDS UNDER THE EIGHTH AMENDMENT IS NOT REQUIRED TO BE SUPPORTED BY A PRIOR MEDICAL EXAMINATION OR PHYSICIAN'S DECLARATION AND DISMISSAL OF THE PETITION ON THIS GROUND WAS CLEARLY ERRONEOUS.

Petitioner's Eighth Amendment claim of conscious disregard of his serious medical needs was brought under Estelle v. Gamble, 429 U.S. 97, 97 S. Ct. 285, 50 L.Ed. 2d 251 (1976).

There is no requirement in that decision or in any statute or regulation which imposes the requirement of a prior medical examination in order to state a valid Eighth Amendment claim. To the extent that the District Court felt that there should be such a requirement, the relief (examination by a private physician) which the habeas corpus petition asked provided a ready vehicle.

Petitioner JOSEPH KIRSH'S physical condition has deteriorated due to the conscious and deliberate disregard of his serious medical need for a

diabetic diet. In F.C.I Otisville, N.Y., Petitioner developed infections in his feet due to diabetes and his foot infections have recurred in F.C.I. Allenwood, PA, where he is now monitored twice weekly at the prison hospital - still without a diabetic diet. Petitioner suffers from ulcerative colitis, chronic kidney stones and acute hypertensive angina syndrome causing shortness of breath. He desperately needs to be examined by a private physician as requested in his habeas corpus petition under Estelle v. Gamble, supra.

B. THE CASE AT BAR PRESENTS THE ISSUE OF INJUNCTIVE RELIEF LEFT OPEN IN FOOTNOTE 5 OF THIS COURT'S DECISION IN McCARTHY v. MADIGAN.

Since McCarthy v. Madigan was not addressed by the Court of Appeals, a remand for consideration in light of that decision might be appropriate. The question is whether the grievance procedure, 28 C.F.R. 542.10, et seq., probably would be capable of producing a diabetic diet, which has not been available to Petitioner at Metropolitan Correctional Center, New York, FCI Otisville, N.Y., FCI Petersburg, Va. or L.S.C.I. Allenwood, Pa. This relief, other similar relief, and an examination of Petitioner's multiple, inter-acting serious medical conditions by a private physician, are the type of relief sought in Petitioner's habeas corpus proceeding under Estelle v. Gamble. The constitutional violations alleged under the Eighth Amendment are of a continuing nature, involve deliberate disregard of the serious medical needs of Petitioner and other diabetic inmates for a diabetic diet and related medical care not available in the Federal Bureau of Prisons. Therefore, there is a serious question as to whether the grievance procedure would be capable of producing the type of

corrective action desired. See McCarthy v. Madigan, 112 S. Ct., at 1091, note 5. The Court of Appeals did not address this question or engage in this analysis. To that extent, the decision of the Court of Appeals is not consistent with the decision of this Court in McCarthy and should be corrected.

CONCLUSION

For the foregoing reasons, Petitioner JOSEPH KIRSH prays that his Petition be granted and that the judgment of the Court of Appeals affirming the denial of his habeas corpus proceeding on the alternative ground of failure to exhaust administrative remedies under 28 CFR 542.10, et seq. be either vacated and reversed in their entirety or vacated and remanded for further proceedings consistent with this Court's decision in McCarthy.

Dated: New York, N.Y.
May 11, 1994

A. LAWRENCE WASHBURN, JR.
(Counsel of Record)
405 West 23 St. (#12C)
New York, N.Y. 10011
(917) 797-6776
Counsel for Petitioner JOSEPH KIRSH

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of January, one thousand nine hundred and ninety-four.

PRESENT:

HONORABLE JON O. NEWMAN,
Chief Judge.
HONORABLE RALPH K. WINTER,
Circuit Judge.
HONORABLE CHARLES L.BRIEANT,
District Judge.*

JOSEPH KIRSH,

Petitioner-Appellant,

v.

WILLIAM SCOTT, WARDEN,
METROPOLITAN CORRECTIONAL CENTER,

Respondent-Appellee.

No. 93-2505

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* Of the United States District Court for the Southern District of New York, sitting by designation.

ORDER

Appeal from the United States District Court for the Southern District of New York (Kevin T. Duffy, Judge).

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

Joseph Kirsh appeals from the July 27, 1993, order of the District Court for the Southern District of New York denying his petition for habeas corpus. On appeal, Kirsh argues that he is not required to exhaust his administrative remedies before seeking habeas corpus relief for an alleged Eighth Amendment violation. Kirsh contends that he has been subject to "cruel and unusual punishment" because the Metropolitan Correctional Center ("MCC") declined to admit Kirsh's private physician to the facility to treat him. July 1993 affidavits from Kirsh's attorney and private physician asserted that "any incarceration of Joseph Kirsh will be severely and materially detrimental to his health... even to the point of being life threatening," and that consumption of prison food "will cause the death of Joseph Kirsh in a realtively [sic] short, predictable time period in excess of 30 days."

We have held that a habeas petitioner "must exhaust his administrative remedies before seeking federal review of his conviction unless administrative

procedures are unavailable or are incompetent to provide adequate redress." Gonzalez v. Perrill, 919 F.2d 1, 2 (2d Cir. 1990) (citing Johnpoll v. Thornburgh), 898 F.2d 849, 851 (2d Cir.), cert. denied, 111 S. Ct. 63 (1990); J.G. v. Board of Educ., 830 F.2d 444, 447 (2d Cir. 1987)). Here, the petitioner has declined to seek redress for his grievances through the comprehensive procedures set out at 28 C.F.R. §§ 542.10 et seq. for "formal review of a complaint which relates to any aspect of [an inmate's] imprisonment...." Id. at § 542.10. Kirsh argues that Eighth Amendment claims are exempt from administrative exhaustion requirements, apparently because they present issues of urgency.

However, as we noted in Gonzalez, where the petitioner argued that he had been re-arrested after serving the entirety of his sentence and was entitled to immediate release, "urgency... does not vitiate the requirement that [the inmate] exhaust his administrative remedies." 919 F.2d at 2. As in Gonzalez, the petitioner here "provides no reason... to believe that the administrative procedures in place cannot expediently resolve [his] claim...." Id. Indeed, "[a]dministrative procedures can, when available, provide an adequate and often the most expeditious review of prisoner grievances." Willis v. Ciccone, 506 F.2d 1011, 1015 (8th Cir. 1974) (emphasis in original).

Even if we were to reach the merits in this case, however, we note that the petitioner's claim would fail. The District Court found that all of the conditions listed in his private physician's affidavit--including high blood pressure, kidney stones, and angina pectoris--"can easily be treated in the federal prison system." The petitioner has made no showing to the contrary, nor has he controverted the

Government's evidence that the severity of his condition has been exaggerated.

_____

Chief Judge.

_____

Circuit Judge.

_____

District Judge.

N.B. ***THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.***

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPH KIRSH,

Petitioner,

-against-

WILLIAM SCOTT, WARDEN,
METROPOLITAN CORRECTIONAL CENTER,

Respondent.

No. 93 Civ. 4767 (KTD)
ORDER

KEVIN THOMAS DUFFY, D.J.:

This petition for habeas corpus was initiated after a preconviction remand of the petitioner during trial. Since that time the petitioner has been convicted of sending threatening communications and of illegal possession of two high-powered rifles. After his conviction, I found it impossible to rule on "the clear and convincing evidence" that he would not be a danger to the community. Thereafter, I remanded him without bail.

The conviction and the post-conviction remand has changed the situation so dramatically as to render this petition for a writ of habeas corpus moot. In any event, the claims that the petitioner will not get adequate medical treatment is without any foundation. According to the doctor whose affidavit

is attached to the instant application, the petitioner suffers, at most, from Hypertension and has a history of kidney stones and his complaints are "suggestive of Angina Pectoris." All of these conditions can be treated in the federal prison system.

The memorandum and affidavit of "special counsel" Lawrence A. Washburn submitted in some type of attempt to amend the writ actually add nothing to the matter. Washburn, who does not claim to be a medical expert, tried to convince this court that dire consequences will follow immediately from the petitioner's incarceration. The problem is that Washburn is not a medical expert and all of his speculation is nothing more than speculation. Upon such a poor foundation, the exercise of the Great Writ will not lie.

Petition for a writ of habeas corpus is denied and the matter is closed.

SO ORDERED.

DATED: New York, New York
July 27, 1993

KEVIN THOMAS DUFFY, U.S.D.J.